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ABSTRACT

The scenario: Pictures of children in various states of nudity are discovered in an elementary teacher's desk. What does one do? This paper offers guidance, much of it based on common sense, for administrators who may find themselves in a situation fraught with serious consequences if a mistake is made in determining the truth. Court decisions are provided for specific legal guidance. Immediate issues to address are as follows: (1) Is there any right way to proceed? (2) Why and what is one going to investigate? (3) Are there any documents that need to be looked at before starting the investigation? (4) Does one talk to him or search his desk and/or his computer as the next step? (5) If one is going to conduct a search, is it by the administrator or with help from the police or some other outside entity? and (6) Can he be forced to talk, and what can be done if he refuses to talk? The issues associated with this type of situation are complex and require careful actions. The purpose of this paper is not to stop one from taking action, but rather to alert one to problematic areas so that pitfalls can be avoided. (RT)

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Sex and the Computer.

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SEX AND THE COMPUTER

Presented to the ELA 48th Annual Conference
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As the principal of Students All Graduate Elementary School (SAGES), your third grade teacher, Ms. Goodteacher, asks to meet with you on a sensitive matter. You meet with her and she tells you that she saw pictures of young children in various states of nudity in Mr. Guy's desk when she was looking for a book list she had given him. Upon further questioning of Ms. Goodteacher, she tells you that there were two pictures that appear to be printed from a computer.

Each classroom, including Mr. Guy's room, has a computer for the teacher to use for instructional purposes and the computer is only to be accessed by the teacher. You have suggested that each teacher's computer be password protected.

You have no reason to doubt the sincerity of what you have been told by Ms. Goodteacher. Mr. Guy has been teaching for seven years and there is nothing in his past conduct to indicate any improper actions with students. Although not the best teacher, Mr. Guy has always been a responsible teacher and has had and continues to have a good relationship with his students.

How do you proceed from here?

IMMEDIATE ISSUES

1. Is there any right way to proceed?
2. Why and what are you going to investigate?
3. Are there any documents you need to look at before starting your investigation?
4. Do you talk to him or search his desk and/or his computer as the next step?
5. If you are going to conduct a search, is it by you or with help from the police or some other outside entity?
6. Can you force him to talk, and what can you do if he refuses to talk?

IS THERE A RIGHT WAY TO PROCEED?

There is no one right way to proceed. Events are intertwined and plans often and quickly change. You do need to plan an approach before you start. Carpenters have an adage that says measure twice before you cut. For you - - think twice before you proceed.

WHY AND WHAT ARE YOU GOING TO INVESTIGATE?

Has Mr. Guy done anything wrong? Has he possibly violated any school board policy or procedure? Has he violated any state or federal law? Do you know whether he printed those pictures, someone gave them to him, or someone planted them in his desk? Does Mr. Guy even know about the photos? Could Mr. Guy have confiscated the photos from a student(s) or others?

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Most schools have an "acceptable use" policy for employee use of the computer. Does your school district have such a policy? Does that policy prohibit display, storage or printing of pictures of nude children?

Wis. Stat. § 948.12 prohibits the possession of child pornography and prescribes criminal penalties for a violation. Most, if not all, states have similar statutes. Two federal criminal laws might also be involved. 18 U. S. C. § 2252A(a)(2)(A), Receiving Materials Containing Child Pornography and 18 U.S. C. § 2252A(a)(5)(B), Possession of Material Containing Child Pornography.

You have decided that the best way to proceed is to call in Mr. Guy and talk to him. What should you do when you contact him? (Assume there is a collective bargaining agreement with a "just cause" standard for disciplining an employee.)

Mr. Guy is probably entitled to have union representation when you talk to him. *NLRB v. Weingarten, Inc.* 420 U. S. 251, 88 LRRM 2689 (1975) adopted by the Wisconsin Employment Relations Commission in *City of Milwaukee*, Dec. Nos. 14873-B and 14889-B (WERC, 8/80). Most states with public-sector collective bargaining laws have also adopted *Weingarten*.

These cases provide that an employee may refuse to participate in an investigative interview without union representation where the employee reasonably believes that the interview may result in discipline. The right only arises where the employee requests representation and he can participate in an interview without a representative if he forgoes his right to request one. The employee must reasonably believe the interview will result in discipline and "reasonable belief" is measured by objective standards. The employer has no obligation to continue with an investigative interview once union representation is requested, and generally, the employer can choose to terminate the interview if it does not wish the involvement of union representation. (Be sure to check your state law on this point). The Employer does not have to justify its refusal and can continue on its investigation without questioning the employee. The employee then forgoes any benefits that may be derived from participating in an investigatory interview.[1]

Also, check your collective bargaining agreement to determine whether there is any language on this subject. Even if there is no collective bargaining agreement and no union, the employee's rights in this regard may be just as extensive. The National Labor Relations Board has ruled that non-unionized employees have a right to have a coworker present to assist them at an investigatory interview that the employee reasonably believes might result in disciplinary action. *See Epilepsy Foundation of Northeast Ohio v. N.L.R.B.* 268 F.3d 1095 (D.C. Cir. 2001)

What happens if Mr. Guy does not cooperate with you? (Later this outline will cover the topic of what happens if he remains silent). What do you do next?

CAN THE EMPLOYEE'S DESK AND/OR COMPUTER BE SEARCHED?

Remember, an employee can always consent to a search so be sure to ask the employee to agree to the search. This presentation will focus upon what to do if consent is not obtained.

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[1] Query: how does the employee know that the interview may result in discipline? Therefore, as a practical matter, many employers advise the employee of the right to union representation.

What are you going to search? There are different things to consider depending on what is going to be searched. Who will conduct the search? Depending on who conducts the search there may be different legal standards involved.

What will be searched? His desk, file cabinet, computer, and/or his backpack?

The lead U.S. Supreme Court case for searching a public employee's office, desk and file cabinet without first obtaining a search warrant is *O'Connor v. Ortega*, 480 U. S. 715, 1 IER Cases 1617 (1987). The hospital where Dr. Ortega was employed entered his office a number of times and seized several items from his desk and file cabinets. The Court had to decide two questions. The first question was whether a public employee had a reasonable expectation of privacy in the employee's office, desk, and file cabinets at the employee's place of work. The Court concluded that whether such an expectation applied to any particular place or thing depended upon "societal expectations" as determined on a case-by-case basis.

The second question concerned the appropriate Fourth Amendment standard for a search conducted by a public employer in those areas of the workplace in which the public employee is found to have a reasonable expectation of privacy. The workplace includes those areas and items that are related to work and are generally with the employer's control such as offices, desks, and file cabinets. These areas remain part of the workplace context even if the employee has placed personal items in them. The appropriate standard for a workplace standard does not necessarily apply to a piece of closed personal luggage, a handbag, or a briefcase that happens to be within the employer's business address.

The Supreme Court found that in Dr. Ortega had a reasonable expectation of privacy to some extent in his desk and file cabinets because Dr. Ortega did not share his desk or file cabinets with any other employees. Having made this determination, the Court had to determine what was the proper Fourth Amendment standard for the search.

The Court determined that a warrant was not necessary where a work-related search was merely incident to the primary business of the agency. It then moved on to the question of whether the "probable cause" standard was the appropriate standard for the search. Because the search of Dr. Ortega's office was either a non-investigatory work-related intrusion or an investigatory search for evidence of suspected work-related employee misfeasance, the court confined its decision to only these two types of employer intrusions.

Here, the Court begs the question: for what purpose is the employer conducting the search? Is it to gather evidence for a future criminal prosecution, or for an employee disciplinary action based upon violation of either a criminal statute or an employer policy (such as an "acceptable use" policy)? The answer may implicate the effectiveness of the search and may raise double-jeopardy issues, to be discussed later. The Court also stated there was not an expectation that a public employer need be knowledgeable about the niceties of "probable cause" when the search is not used to gather evidence of a criminal offense.

The Court eventually held that a public employer intrusion on the constitutionally protected privacy interests of government employees for a non-investigatory, work-related purpose, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances. Under this reasonableness standard, both the inception and the scope of the intrusion must be reasonable. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider wither the action was justified at its inception; second, one must determine whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place.

Ordinarily, a search of an employee's office by a supervisor will be justified in its inception when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a non-investigatory work-related purpose such as to retrieve a needed file.

What happens if you also want to involve the school's police liaison officer because either you are uncomfortable doing the search or there is possible criminal conduct involved? What standard applies to the search and does it make any difference? The answer to the second part is that it might make a difference as to what evidence obtained from the search can be used against the employee in future proceedings.

The answer to what standard applies to a police liaison (resource officer) search of a school employee has not been answered in Wisconsin. There is an answer for the question when there is a search of a student suspected of carrying a dangerous weapon on school grounds by a police officer at the request of, and in conjunction with, school authorities. In that situation, the Wisconsin Supreme Court held that the "reasonable grounds" was the proper standard.[2] (Sometimes that standard is also labeled "reasonable suspicion"). The Court stated that, in contrast, a police investigation that includes the search of a public school student which is initiated by police and conducted by police would be covered by the "probable cause" standard.[3]

The practical aspect of the difference of standards concerns the quantum of facts needed to conduct or initiate the search. The higher the standard, the more facts justifying the search are needed before the search can be conducted. There are three ways an employee can attack the search. First, if the employee is prosecuted for a crime, the employee can seek to have the evidence suppressed claiming an improper search under the U.S. Constitution's Fourth Amendment prohibition against unreasonable search and seizure. Second, the employee can attempt to sue the school claiming a violation of 42 U.S.C. § 1983 as well as the Fourth and perhaps the Fourteenth Amendments. Such a lawsuit seeks damages against the employer. The third way is to use the just cause standard in a

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[2] *In the Interest of Angelia D. B.* 211 Wis. 2d 140, 564 N.W.2d 682 (1997)

[3] But see *State of New Hampshire v. Joseph Heirtzler* 789 A.2d634 (2002) where the court found an agency relationship existed between police and school officials that conducted the search of a student, and thus, school officials were required to adhere to the same procedural safeguards as the police.

collective bargaining agreement or similar document and claim the investigation was not conducted properly.

Is there enough information to proceed with a search of Mr. Guy's desk? His computer? It is a very close call. Does your District have a policy allowing searches of a desk, file cabinet, or computer? Does your District have a policy allowing audits, inspections or monitoring of Internet usage? Are there specific court decisions in your state addressing whether a search can be initiated, how it may be conducted, or to what extent evidence obtained can be used? All of these factors play a role in what you can do and the wisdom of the particular course of proceeding that you choose.

MR. GUY REFUSES TO TALK WITH YOU

Assume for further discussion, your search of Mr. Guy's computer turned up 20 downloaded pictures of nude children. You want to talk to Mr. Guy and his representative about what you have found. Mr. Guy refuses to answer any of your questions. Can you use his silence as an admission or inference of his guilt?

There are two issues involved. The first is his right to remain silent. The second is whether the school is entitled to draw an adverse inference from Mr. Guy's silence.

Because there are potential crimes involved, Mr. Guy has the right to remain silent unless granted immunity from criminal prosecution by the school. *Lefkowitz v. Cunningham*, 431 U.S. 801, 806, 97 S. Ct. 2132 (1977). "We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and it extends, to all whether they are policemen or other members of our body politic." *Garrity v. State of New Jersey*, 385 U.S. 493, 500, 87 S. Ct. 616, 620 (1967). *See* also, *Gardner v. Broderick*, 392 U.S. 273, 276, 278-279, 88 S. Ct. 1913 (1968).

The U. S. Supreme Court in *Baxter v. Palmigiano,* 435 U.S. 308, 316, 96 S. Ct. 1551, 1557 (1976) had the following to say on this point:

> As the Court has often held, the Fifth Amendment 'not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'

The Wisconsin Supreme Court has adopted the following as guidance in this area:

> A public employer may discharge an employee for refusal to answer where the employer both asks specific questions relating to the employee's official duties and advises the employee of the consequences of his choice, i. e., that the failure to answer will result in dismissal but that answers he gives and fruits thereof cannot be used against him in criminal proceedings. *Oddsen v. Board of Fire and Police Commissioners,* 108 Wis. 2d 143, 164, 321 N.W.2d 161, 172 (1982).

Of significance and very unique is the Seventh Circuit's decision in *Atwell v. Lisle Park District*, 286 F.3d 987, 18 IER Cases 901(7 Cir., 2002) where the court stated that "the government employer who wants to ask an employee potentially incriminating questions must first warn him that because of the immunity to which the cases entitle him, he may not refuse to answer the question on the ground that the

answers may incriminate him." 286 F.3d at 990; *citing United States v. Devitt*, 499 F.2d 135, 141 (7 Cir., 1974) and *Confederation of Police v. Conlisk*, 489 F.2d 891, 894 (7 Cir., 1973).

The Seventh Circuit recognized that two other Circuits have rejected this view, the issue expressly left open by the Fourth and Tenth Circuits and followed by none. *See, Gulden v. McCorkle*, 680 F.2d 1070 (5 Cir., 1982) (holding that an employee may be discharged for refusal to submit to a polygraph examination on the issue of whether he telephoned a bomb threat to his employer during working hours; however the court cautioned that the result might be different if the employee has been specifically requested or directed to waive constitutional privileges under pain of discharge from employment); *Hill v. Johnson*, 160 F.3d 469 (8th Cir., 1998) (county sheriff held entitled to require officer to answer questions about disappearance of photograph from the officer's desk or forfeit his job without violating his Fifth Amendment privilege against self-incrimination); *Wiley v. Mayor and City Council of Baltimore*, 48 F.3d 773 (4 Cir., 1995) and *Grand Jury Subpoenas Dated Dec. 7 and 8 v. United States*, 40 F.3d 1096 (10 Cir., 1994). So you may want to consult the state of the law in your jurisdiction.

What inference, if any, can the School draw from Mr. Guy remaining silent? The School can draw an adverse inference when an employee refuses to testify in response to probative evidence offered against the employee. If the School has independent evidence that the employee has engaged in misconduct, the School may constitutionally consider the employee's silence as additional supporting evidence. In short, where there is other evidence of misconduct, an employee's silence may properly become an additional factor pointing towards a guilty finding. *See Baxter v. Palmigiano*; *Atwell v. Lisle Park District, supra*, 286 F.3d at 991 (drawing an adverse inference from invocation of Fifth Amendment rights is permitted in civil cases).

However, the converse is also true. An adverse decision may not be based solely upon a party's invoking the Fifth Amendment privilege. Although invoking the Fifth Amendment may arouse suspicion, it cannot establish by itself the disputed fact. If the School improperly draws an adverse inference and if that inference contributes to disciplinary action against the employee, subsequent criminal prosecution of the employee may be compromised.

COORDINATION WITH LAW ENFORCEMENT

Assume that the School has gathered enough information to proceed with a disciplinary hearing against Mr. Guy while the police are also conducting an investigation. Does the School have to wait until the criminal matter is done to go forward? NO. Nothing prevents the School from going forward with its own disciplinary process. However, the School needs to be careful no to undertake action that impairs a criminal investigation or subsequent prosecution of the offending employee.

CLAIMS OF DOUBLE JEOPARDY

What about Mr. Guy's potential claim of double jeopardy? Make sure you check your state's cases. The U.S. Supreme Court in *Hudson v. United* States, 522 U.S. 93, 118 S. Ct. 488 (1997) *overruling United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892 (1989) and the Second Circuit in *SEC v. Palmisano*, 135 F.3d 680 (2 Cir., 1998) have provided guidance in this area. *Hudson* represented a

significant narrowing of the double-jeopardy doctrine in the context of parallel criminal and non-criminal (civil, administrative, or municipal forfeiture) proceedings against the same offender.

The Double Jeopardy clause protects against multiple *criminal* punishments for the same offense in successive proceedings. It does not necessarily prohibit the imposition of multiple sanctions that might be construed as "punishment." Nor does it prohibit imposition of both civil and criminal penalties for the same offense, even in successive proceedings. "Jeopardy" attaches only upon imposition of criminal punishment. *Breed v. Jones*, 421 U.S. 519, 528, 95 S. Ct. 1779, 1785 (1975). The question thus becomes whether a particular punishment is criminal or civil.

Initially this is a matter of statutory construction, i.e. determining the intent of the legislature. The Supreme Court has stated that one must first ask whether the legislature in establishing the penalizing mechanism, indicated either expressly or impliedly, a preference for one label or the other. Even in those cases where the legislature has indicated an intention to establish a civil penalty, further inquiry must be made to determine whether the statutory scheme is so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty. As respects this latter determination, there are seven factors that were set out by the Court in *Kennedy v. Mendoza-Martinez* 372 U.S. 144, 168-169, 83 S. Ct. 544, 567-568. These factors are:

1. Whether the sanction involves an affirmative disability or restraint;
2. Whether it has historically been regarded as a punishment;
3. Whether it comes into play only on a finding of *scienter* (intent);
4. Whether its operation will promote the traditional aims of punishment-retribution and deterrence;
5. Whether the behavior to which it applies is already a crime;
6. Whether an alternative purpose to which it may rationally be connected is assignable for it; and
7. Whether it appears excessive in relation to the offense.

The Court also stated "[i]t is important to note, however, that 'these factors must be considered in relation to the statute on its face,' . . . and 'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty . . . ." *Hudson v. United States, supra,* 522 U.S. at 100, 118 S. Ct. at 493.

Clearly, it is now quite difficult to successfully maintain double-jeopardy contentions in the context of investigation or discipline of employees (or students) for conduct also constituting a criminal offense. In one leading case, the University of Wisconsin-Oshkosh punished a student for violation of its Student Code of Conduct while the City of Oshkosh prosecuted the student for disorderly conduct. The student claimed the City's prosecution constituted double jeopardy. The Court rejected that claim in *City of Oshkosh v. Winkler*, 206 Wis. 2d 538, 557 N.W.2d 464 (Ct. App. 1996).[4]

> The Wisconsin Supreme Court recently analyzed the double jeopardy clause in *State v. Carpenter*, 197 Wis. 2d 252, 541 N.W.2d 105 (1995). There, the court explained that the determination of whether a sanction constitutes punishment triggering the double

[4] This case was decided before the *Hudson* decision which, as earlier noted, overruled the *Halper* case (*United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892 (1989)).

jeopardy clause depends on the purpose served by the sanction. Id. at 264, 541 N.W.2d at 109 (citing *Halper*, 490 U.S. at 447 n. 7). If the principal purpose of a regulation is punishment, retribution or deterrence, then that regulation is a sanction which triggers double jeopardy protection. See *Id.* at 264, 541 N.W.2d at 109-10. *Winkler* at 543.

The court then concluded as follows:

However, based on the legislative evidence that the purpose of the university rule is to maintain institutional order, we conclude that the university's disciplinary action is not a punitive sanction triggering the double jeopardy clause. The plain language of § UWS 17.01 tells us that the purpose of these administrative sanctions is to "preserve the orderly processes of the university." Faced with such language, we are not persuaded that the university's student discipline process may only be characterized "as a deterrent or retribution." See, *Carpenter, 197* Wis.2d at 264, 541 N.W.2d at 110 (quoted source omitted). *Winkler* at 545.

Following *Hudson*, the difficulty of asserting double-jeopardy claims became even more apparent. *See*, the following cases: *Nestorenko v. Arkansas Board of Chiropractic Examiners*, 76 Ark. App. 561, 69 S.W.2d 459 (2002) (holding that imposition of administrative sanctions against chiropractor for violation of regulations against misleading advertising did not constitute "punishment" under *Hudson* double-jeopardy analysis since the goal of the administrative sanction was remedial, not punitive, i.e. to protect the public from harm); *Matter of Krystal Nicole Phillips*, 128 N.C. App. 732, 497 S.E.2d 292 (1998) (holding that a student suspension for theft of school cash did not constitute "punishment" that would bar prosecution of the offending student in juvenile court for the same theft).

In contrast, however, *see People v. Hanson*, 23 Cal 4th 355, 1 P.3d 650 (2000) (holding that a statutory "restitution fine" imposed on top of a criminal conviction constitutes "punishment" for purposes of double jeopardy). For a good general discussion of the evolution of double-jeopardy jurisprudence in the school-discipline context, *see* Thomas R. Baker, *Criminal Sanctions for Student Misconduct: Double Jeopardy Litigation in the 1990's*, 130 Ed. Law. Rep. 1 (Dec. 1998).

Obviously, whether double-jeopardy consideration may be a matter of concern in any particular case will depend heavily on the specific facts of that case. In the context of computer misuse, it would clearly be advantageous for a school to make sure that its computer use policies contain language that speaks to institutional purposes and that outlines its objectives aside from that of simply punishing violators. This may serve to minimize the possible impairment of criminal proceedings against offending employees on double-jeopardy grounds.

SUMMARY

The issues associated with this type of situation are complex and require careful actions. The purpose of this material is **not** to stop you from taking action, but rather to alert you to problematic areas so you can avoid the pitfalls.

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